REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.157 OF 2012

FREDRICK KARIUKI MWANGI …….…… ……APPELLANT

-VERSUS-

REPUBLIC ……..RESPONDENT

(From the original conviction and sentence in Criminal Case Number 75 of 2011 in the Senior Resident Magistrate's court at Baricho - Mr J.N.Mwaniki -(SRM)

JUDGMENT

The appellant ***FREDRICK KARIUKI MWANGI*** was charged in two counts with three different offences.

In count 1, the appellant was charged with the offences of burglary contrary to **section 304(2)** and stealing contrary to **section 279(b)** of the **Penal Code** particulars being that on the night of 27th day of January 2011at 2 a.m at Kathaka village Mwerua location in Kirinyaga District of the Central province, jointly with another not before the court, he broke and entered the dwelling house of ***JANE WANJIRU KIBIA*** with intent to steal and did steal from therein one matress and two sufurias all valued at kshs 3,000 the property of ***JANE WANJIRU KIBIA*** .

In the second count, he faced a charge of resisting arrest contrary to **section 253(b) of the penal code** in that on the 28th day of January 2011 at Kathaka village, he resisted being arrested by ***NO. 54190 CPL RAMA MAHMOOD*** and ***NO. 75376 P.C. VICTOR BAYA*** police officers who at the time of the said resistance were acting in the due execution of their duty.

After full trial, the appellant was acquitted in respect of count 2 but was convicted in count 1 and sentenced to seven years imprisonment in each limb of the offence. The sentences were ordered to run concurrently.

Following the conviction and sentence, the appellant filed this appeal citing seven grounds of appeal. A close look at the said grounds of appeal show that most of them were duplicated and can be collapsed into two main grounds as follows;-

1. That the learned trial magistrate erred in law and in fact by convicting the appellant on the basis of insufficient evidence as only members of one family testified against him and no exhibits were produced in court.
2. That the trial magistrate erred in law and in fact by failing to consider his defence.

The case for the prosecution was that on the night of 26th and 27th January 2011 at around 2 a.m., PW1 ***JANE WANJIRU*** was in her house asleep when she was awoken by a commotion in her son's house

which was adjacent to her house. She rushed out and saw a person coming out of her son's house through the window. She started screaming as she held the intruder and a struggle ensued.

Her screams attracted her daughter ***MILLICENT NJERI*** (PW2) to the scene and according to PW2, she found PW1 and the intruder still struggling. By then PW1 had been wrestled to the ground. Both PW1 and PW2 recalled that there was bright moonlight that night and that the intruder's face was not masked. They maintained that through the moonlight, they were able to see and identify the intruder who they recognized to be Kariuki the appellant who was their neighbour before he freed himself from PW1 and ran away.

At almost the same time, the witnesses recalled that they saw another person come out of the same house and disappear from the compound.

When the appellant and his accomplice left, PW1opened her son's house and discovered that a mattress and two sufurias were missing from therein. Later the same morning, the matter was reported to PW4 at Mutino police station.

PW 4 stated in his evidence that when reporting the burglary and theft, PW1 and PW2 named the appellant as the intruder PW1 had briefly arrested in their compound that night. He visited the scene and noted that entry into the house had been gained through breaking its window made up of iron sheets. He thereafter arrested the appellant and charged him with the offences for which he was tried and convicted.

In his defence, the appellant gave a sworn statement and called one witness, his mother. In his sworn statement, he denied having committed the offences as alleged and claimed that he was arrested on his way to work and was taken to Baricho police station where he was charged and arraigned in court for offences he knew nothing about.

His mother who testified as DW2 sought to confirm the appellant's claim that he had been arrested on his way to work on 28th January 2011. Both DW1 and DW2 supported PW1 and PW2's claim that the appellant was infact their neighbour.

When the appeal came up for hearing, the appellant relied on what he referred to as written submissions which were in reality further grounds of appeal which he presented to the court.

The state through the state counsel Mr Sitati opposed the appeal mainly on grounds that the evidence adduced before the lower court was sufficient to sustain a conviction and that therefore the appellant was rightly convicted. Counsel urged the court to dismiss the appeal for lack of merit.

This being a first appeal, I have re-examined and reconsidered the evidence on record as I was required to do: see

- **MWANGI VS REPUBLIC (2004) 2 KLR 28**
- **-KIILU & ANOTHER VS REPUBLIC (2005) 1 KLR 174**

I have also considered the "submissions" made by the appellant and the state counsel.

After analyzing the evidence on record, I find that though it is true that the prosecution's key witnesses PW1 and PW2 were members of one family being mother and daughter, they were two distinct competent witnesses who gave their own account of what they witnessed at the material time and therefore their evidence cannot be said to be evidence of a single witness as alleged by the appellant.

PW1's evidence that she saw and recognized the person leaving her son's dwelling house through the window that night as the appellant herein was materially supported by the evidence of PW2 who on hearing PW1's screams went to the scene and found the appellant still struggling with PW1.

Both witnesses were consistent in their evidence that there was bright moon light that night and it aided

them in seeing and recognizing the appellant through his physical appearance because they knew him before being their neighbour and his face was not covered by any mask or anything else. The credibility of these witnesses was not challenged by the appellant.

The trial magistrate who saw them as they testified found them to have been reliable witnesses. He believed and accepted their evidence. I did not have an opportunity of hearing or seeing the witnesses and I have no reason to doubt their credibility. In any event, they demonstrated consistency and certainty in their claim that they had seen and recognized the appellant that night after he emerged from the house in question through the window as they gave his name to PW4 when they reported the matter. PW4 on visiting the scene confirmed that the house's window had been damaged.

The complaint by the appellant that the trial magistrate did not consider his defence is not merited. The record shows that the learned trial magistrate considered his defence and after comparing it with the evidence adduced by the prosecution arrived at the conclusion that it was unworthy of belief as the appellant was positively identified to have been the intruder in PW1's home on the material night.

I am in agreement with the learned trial magistrate that the circumstances in this case were conducive to a correct and positive identification and recognition of the appellant in the light of undisputed evidence that there was bright moon light that night and PW1 had spent some time struggling with the appellant. She therefore had an opportunity to see and identify him as did PW2 and I am satisfied that in the circumstances, there was no room for mistaken identity.

In the premises I am satisfied that there was sufficient evidence to prove beyond doubt that the appellant was one of the people who had broken into PW1's son's dwelling house that night. They must have broken into the house with the intention of committing a felony therein namely theft but there is no evidence to prove that they managed to steal anything from the house.

I make this finding because PW1and PW2 did not say that they saw the appellant or the person they saw disappearing from the compound carrying anything from the said house. It is also noted that when PW4 searched the appellant's house on the following day, nothing was recovered. More importantly, PW1's son, the owner of the dwelling house from which the items described in the charge sheet were allegedly stolen was not called as witness in this case to confirm or deny that he ever owned such items and that they had been in his house prior to the material date and how if at all, they were found missing.

The result is that though the evidence on record proved to the required legal standard that the appellant jointly with another had broken into the house that night, there was no evidence to prove beyond doubt that any theft was committed from therein as alleged.

This in effect means that while the offence of burglary charged in the first limb of count 1 was proved, the offence of stealing from a dwelling house charged in the second limb was not proved.

Having made that finding and considering that the two offences had been charged in one count and the fact that the appellant had been convicted in both offences, I have agonized over what would be the appropriate orders to make in such a situation which would not defeat the ends of justice.

In resolving this issue, I wish to start by observing that the offences of burglary and stealing from a dwelling house are two different and distinct offences which are independent of each other. That is why they are created by different provisions of the law and punishment for their commission is also different and separately provided for by the law. I must state at this juncture that though ideally the two offences should be charged separately in different counts, as a matter of practice, they are usually charged in one count possibly because more often than not owing to their nature, they are simultaneously committed in the same transaction.

It is my view that even when they are charged in one count, they still remain different offences and the trial court should treat them as such so that if one offence is proved and not the other, the court should enter a conviction for the offence proved and an acquittal for the limb of the offence which is not proved.

In my considered view, the fact that they are charged together in one count does not cause any prejudice to an accused person since he is made aware of the charges and allegations facing him from the very beginning and he is afforded an opportunity to defend himself.

In this case, I find that the learned trial magistrate erred in failing to properly evaluate the evidence and thereby arrived at the wrong conclusion that both the offences of burglary and theft from a dwelling house had been proved against the appellant beyond reasonable doubt. He failed to make a distinction between the two offences and failed to appreciate that only one limb of burglary had been proved and not both.

In the premises, I find that the conviction for the offence of stealing from a dwelling house was not sound in law since it was not supported by the evidence on record.

In the end, I uphold the conviction and sentence for the offence of burglary contrary **to section 304(2)** of the **Penal Code** charged in the first limb and quash the conviction and set aside the sentence for the offence charged in the second limb of stealing from a dwelling house contrary to **section 279(b)** of the **Penal Code.** This means that the appellant will continue to serve the sentence imposed for the offence of burglary which is seven years imprisonment.

This appeal is therefore partially succeeds as stated above.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 17TH DAY OF DECEMBER 2013 in the presence of:

The appellant

Mr Sitati for the state

Kariuki Court Clerk